

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEYON DEWAYNE TIMMONS,

Defendant-Appellant.

UNPUBLISHED

September 27, 2011

No. 297670

Oakland Circuit Court

LC No. 2009-228759-FC

Before: SERVITTO, P.J., and MARKEY and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions for assault with intent to murder, MCL 750.83, three counts of possession of a firearm during the commission of a felony, MCL 750.227b, felon in possession of a firearm, MCL 750.224f, discharge of a firearm in or at a building, MCL 750.234b, possession of marijuana, MCL 333.7403(2)(d), and malicious use of telecommunications services, MCL 750.540e. Defendant was sentenced to 50 to 80 years' imprisonment for the assault with intent to murder conviction, five years' imprisonment for each felony-firearm conviction, three to seven and a half years' imprisonment for the felon in possession of a firearm conviction, three to six years' imprisonment for the discharge of a firearm in or at a building conviction, 190 days for the possession of marijuana conviction, and 190 days for the malicious use of telecommunications services conviction. We affirm.

I. FACTS

This case arises from a shooting at 390 Shumard Branch in Oxford, Michigan on September 9, 2009. In September 2009, defendant and Heather Warner were involved in a romantic relationship. The two were engaged to be married and lived together in Pontiac. Heather had two children from a prior relationship and was pregnant with defendant's child. The two were dating for about two years; however, defendant was physically abusive, and Heather occasionally displayed bruises and black eyes as a result of defendant's abuse. On September 8, 2009, and September 9, 2009, defendant and Heather had been arguing. Defendant made threatening statements to Heather while she was at work. She called the police and intended to stay at a women's shelter. Further infuriated when confronted by the police, defendant told Heather that she was going to regret having called the police. When Heather refused to tell defendant where she was, he threatened to "blow your cousin's head off." Defendant then said, "fuck [your] cousin . . . I'm [sic] after your mom and your brother and I know where they are."

Defendant said he was going to shoot them. Heather continued to refuse to tell defendant where she was, and he said, “[T]hey can thank you for your actions.” Defendant indicated that if Heather told him where she was going, no one would get hurt. Heather started to cry and told defendant that she was going to the Haven shelter. Defendant got upset and told Heather that she and their unborn child did not belong there. Defendant called Heather again and said, “fuck your mom and your brother, I’ll get them later. I’m going to kill your kids.”

Defendant then proceeded to Heather’s sister’s house where Heather’s children were located. Heather’s five-year-old niece, Jordayna, answered the door. Defendant shot her in the face. Though Jordayna survived the shooting, she suffered serious injuries and will endure a lifetime of disfigurement and hearing loss.

II. SCORING OF OFFENSE VARIABLES 10 AND 19

Defendant argues that the trial court erroneously scored offense variable (OV) 10 and OV 19. We disagree. This Court reviews the trial court’s scoring of the sentencing guidelines for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003). A trial court’s scoring decision is upheld if there is “‘any evidence in support’ of the decision” in the record. *People v Witherspoon*, 257 Mich App 329, 335; 670 NW2d 434 (2003), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996) (emphasis in *Witherspoon*).

Defendant was assessed 15 points for OV 10, which addresses “exploitation of a vulnerable victim” and requires “predatory conduct” for the assessment of 15 points. MCL 777.40(1)(a). Specifically, MCL 777.40 provides, in pertinent part:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Predatory conduct was involved 15 points

* * *

(3) As used in this section:

(a) “Predatory conduct” means preoffense conduct directed at a victim for the primary purpose of victimization.

(b) “Exploit” means to manipulate a victim for selfish or unethical purposes.

(c) “Vulnerability” means the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation.

Defendant argues that there was no preoffense conduct directed at the shooting victim, Jordayna Barrett, as the specific victim. We disagree. In *People v Huston*, ___ Mich ___; ___ NW2d ___ (Docket No. 141312, issued July 26, 2011) (slip op at 1), our Supreme Court held

that a defendant's preoffense conduct only has to be directed at "a victim," not any specific victim.

Defendant's preoffense conduct was directed at the occupants of Heather's sister's house at 390 Shummard Branch. Defendant called Heather and threatened to kill her mother and family. He also specifically threatened to harm the children in the house. He armed himself with a gun and drove to 390 Shummard Branch, where he knew he could find his potential victim. He knocked on the door and fired a gunshot into the house, ambushing the occupants. Although defendant may not have known whom his victim was going to be when he first undertook his actions, i.e., whether his victim was going to be Heather's mother or one of the children, that does not undermine the fact his preoffense conduct was directed at "a victim" inside the house. This is enough to warrant a score of 15 points for OV 10.

In addition, defendant's preoffense conduct was "for the primary purpose of victimization." MCL 777.40(3)(a). The *Huston* Court noted that "victimize is defined as to make a victim of. And victim is defined as a person who suffers from a destructive or injurious action." *Huston*, ___ Mich at ___ (slip op at 5), quoting *People v Cannon*, 481 Mich 152, 161; 749 NW2d 257 (2008). Defendant armed himself with a gun, knocked on the front door, luring Jordayna towards the door, and then shot her. His actions were intended to cause a person in the home to suffer from a destructive or injurious action, i.e., a gunshot wound or death. In light of these facts, defendant's preoffense conduct of arming himself with a gun and knocking on a residential home to attack the occupants amounted to "predatory conduct." We hold that defendant engaged in predatory conduct to exploit a vulnerable victim, and thus, the trial court did not err in assessing 15 points for OV 10.

Next, defendant argues that OV 19 was erroneously scored. OV 19 requires that 10 points be added to defendant's score if he "otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Defendant argues that OV 19 should have been scored at zero points because OV 19 does not encompass later acts. We disagree. Our Supreme Court has held that a defendant's conduct after the completion of the offense can be considered when scoring OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). Specifically, the Court held, "Because OV 19 specifically provides for the 'consideration of conduct after completion of the sentencing offense,' conduct that occurred after an offense was completed may be considered when scoring the offense variable." *Smith*, 488 Mich at 202, quoting *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009).

Defendant's conduct after the shooting interfered with the administration of justice. Defendant hastily fled the scene of the crime, and he sped away in his vehicle. When defendant was apprehended a short time later, the gun and the black hoodie that the witness described were nowhere to be found, showing that defendant disposed of the items after the shooting. Also, defendant concealed a wrench that shattered his vehicle's window under the driver's side floorboard mat. Jordayna's uncle had pursued defendant after the shooting and testified that he threw the wrench at defendant's car before he sped away. This Court has held that efforts to destroy or conceal evidence support a scoring of OV 19. *People v Ericksen*, 288 Mich App 192, 204; 793 NW2d 120 (2010) (defendant asked one of his companions to dispose of the knife he used to stab the victim and asked others to lie about his whereabouts during the night of the crime). Accordingly, the trial court did not err in assessing 10 points for OV 19.

III. DEPARTURE FROM THE SENTENCING GUIDELINES

Defendant next argues that the trial court abused its discretion in departing from the sentencing guidelines. This Court reviews the trial court's reasons for the departure for clear error. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008), citing *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). The conclusion that a reason is objective and verifiable is reviewed de novo. *Smith*, 482 Mich at 300. Further, whether the reasons given are substantial and compelling enough to justify the departure is reviewed for an abuse of discretion, as is the amount of the departure. *Id.* at 300, citing *Babcock*, 469 Mich at 264-265. A trial court abuses its discretion if the minimum sentence imposed falls outside the range of principled outcomes. *Babcock*, 469 Mich at 269.

In seeking a departure from the sentencing guidelines, the prosecutor argued:

There are substantial and compelling reasons, any one of which individually would be sufficient to allow for an upward departure.

First, being that the defendant's offense variable score is what we would call off the charts. Probably the highest I have seen. And a more proportionate sentence would be one that exceeds the guidelines. . . .

Factors not considered, included defendant violated court orders in district court, his failure historically at rehabilitation efforts, his multiple acts of domestic violence against Ms. Warner, both while she was pregnant and before, and the fact that on the day of this offense Ms. Warner, his employer and two of his friends tried to dissuade him from doing anything violent and he did not heed any of those warnings and went ahead and shot this girl.

But mostly, the guidelines do not even consider the future medical suffering and medical care that this victim, Jordayna, is going to have to endure throughout her life or the physical scarring on her face, the most visible part of anyone's body.

Other factors are not given enough weight by the guidelines. Psychological impact on the victim, the family, especially the four other young children who were in the home at the time of the shooting. All are not given adequate weight by the guidelines. . . .

The other children were also placed in danger. . . .

Also, the pervasive nature of defendant's criminal acts, his criminal history, coupled with the fact of his other murder case and he was not rehabilitated it appears at all by that, simply shows he's an extreme danger to the public. In his prior presentence investigation they predicted that it was highly likely that this defendant would reoffend. I don't think anyone could think he would reoffend to harm a five year old child. . . .

I think it's abundantly clear that he's a very dangerous individual and must be removed from the public forever.

The trial court agreed and stated:

Mr. Timmons, whether you want to say it or not, you got into a verbal fight with your girlfriend . . . and it sounds like you got really upset with her. And your reaction, your response to that argument was to go into your girlfriend's sister's house and shoot a little girl in the face.

A little girl who is innocent of everything except the fact that she had the bad fortune of being the one to open the door to you. All she did was open the door and her life changed. She's essentially deaf in one ear, she's having part of her jaw or cheek bone rebuilt. . . .

The purpose of the criminal justice system, I believe, is to punish and to rehabilitate, and for certain people to separate them for a period of time from the population until those things can be achieved. Most hopefully rehabilitation.

Clearly your gross display and disproportionate response shows that you are not fit to be among the population.

I agree with [the prosecutor], but for the entertainment center, I don't know who else would have been harmed. I think the emotional harm is significant as it is to everyone in that home, and I think you only spoke about the other children, but there was an uncle involved who was in charge of the mess of cleaning up, as well as a neighbor. The neighbor is equally harmed by having to go in that bathroom and clean up pools of blood.

You have shown that you need to be separated in order to do no further harm to anyone in this society. I think [the prosecutor] - - and I will adopt his argument - - has laid out an excellent argument as to why guidelines are not adequate in this particular matter.

The trial court made an upward departure from the sentencing guidelines minimum range of 225 to 468 months, sentencing defendant to a term of 600 to 960 months.

In denying defendant's subsequent motion for resentencing, the trial court stated:

Defendant is correct the Court agreed to exceed the guideline range based in part, on one small part on defendant's high offense variable score. What defendant does not address, however, is the fact that defendant's offense variable would remain exceedingly high even if it was changed as he suggests and requests. . . .

This, combined with the overall horrific nature of the crime, the predatory conduct, the premeditated nature of the matter, past violent criminal history, the lack of remorse, the lack of community support, fleeing of the scene, lack of

rehabilitation, hiding his identity all during the course of the crime, convinces the Court there is no need for resentencing in this case.

MCL 769.34(3) affords the trial court discretion to depart from the minimum sentencing guidelines range “if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” A court should only find reason to depart from the recommended sentence in “exceptional cases.” *Babcock*, 469 Mich at 257. The court must rely on factors that are “objective and verifiable” and that “keenly or irresistibly grab [the court’s] attention.” *Id.* The factors also must be “of considerable worth in deciding the length of a sentence.” *Id.* The court may only base its departure “on an offense characteristic or offender characteristic already taken into account” in the sentencing guideline variables if “the characteristic has been given inadequate or disproportionate weight.” MCL 769.34(3)(b). Moreover, the particular sentence imposed must qualify as proportionate to the specific defendant’s conduct and criminal history. *Smith*, 482 Mich at 300.

We conclude that the trial court articulated substantial and compelling reasons justifying an upward departure from the sentencing guidelines. The judge justified the departure by calling attention to the effect of defendant’s actions on Jordayna, and her family, and even Scott Tribble, the neighbor, to defendant’s prior criminal record, to the future medical treatment Jordayna will undergo, to the premeditated nature of his action, and to his high OV total (S, pp 20-21).

Defendant was assessed a total of 166 OV points. This score placed defendant in the highest offense variable level (OV Level VI) of the applicable guidelines grid. See MCL 777.62. Any defendant having 100 or more OV points falls within OV Level VI. Accordingly, 66 points (166 points minus 100 points) were not meaningfully scored in the guidelines. Thus, the additional 66 points had no impact on the range and could support an upward departure. See *Smith*, 482 Mich at 308-309 (because the Legislature did not contemplate points above the number required to fall within the highest variable level of the applicable guidelines grid, such surplus points may be used to depart from the minimum range).

Defendant had a prior criminal record consisting of violent assaultive crimes to support its departure. The extent of defendant’s criminal history or recidivist behavior constitutes an objective and verifiable fact. See *People v Horn*, 279 Mich App 31, 45; 755 NW2d 212 (2008). The presentence investigation report noted that defendant committed eight new criminal offenses while on parole for his conviction of second-degree murder. It is well established that a court may consider a defendant’s past criminal history and failures at rehabilitation as objective and verifiable factors establishing “a firm probability of future” criminal activity. *Id.*; see also *People v Solmonson*, 261 Mich App 657, 671; 683 NW2d 761 (2004). Defendant’s juvenile adjudications, two prior felony convictions, one of which was second-degree murder, and his misdemeanor convictions “keenly and irresistibly grabs [one’s] attention” and are of “considerable worth” in fashioning defendant’s sentence for his current offense. We agree with the trial court that the guidelines afforded inadequate weight to defendant’s recidivist behavior.

The psychological impact to Jordayna and her family was also an objective and verifiable fact that was not sufficiently addressed in the guidelines. Jordayna underwent facial reconstructive surgery and will have permanent scars on her face. As a result of defendant’s conduct, she requires a hearing device. The scars and hearing aid will be a constant reminder of

defendant's horrific acts. Also, according to her mother, Jordayna is now afraid of "everything" and will not go near doors. There was no error in the trial court's determination that the available offense variable points inadequately measure the psychological injury to Jordayna and her family.

In sum, in departing from the guidelines, the trial court articulated that it based the upward departure on the failure of the sentencing guidelines to fully consider the severity and permanence of the physical injuries to Jordayna, the severity of the psychological effect on Jordayna and her family, defendant's prior criminal record of assaultive offenses, and his high OV score. We conclude that the above considerations were based upon readily verifiable facts, were clearly supported and represented substantial and compelling reasons for the upward departure.

Defendant also argues that the trial court failed to justify the extent of the departure. We disagree. In *Smith*, the Court held that "the statutory guidelines require more than an articulation of reasons for a departure; they require justification for the particular departure made." *Smith*, 482 Mich at 303. The Court cautioned that:

if it is unclear why the trial court made a particular departure, an appellate court cannot substitute its own judgment about why the departure was justified. A sentence cannot be upheld when the connection between the reasons given for departure and the extent of the departure is unclear. When departing, the trial court must explain why the sentence imposed is more proportionate than a sentence within the guidelines recommendation would have been. [*Id.* at 304.]

That is, the trial court must provide "an explanation of why the sentence imposed is more proportionate to the offense and the offender than a different sentence would have been." *Id.* at 311.

The trial court not only articulated substantial and compelling reasons to make an upward departure from the sentencing guidelines, but also adequately articulated a justification for the extent of the departure. The sentence imposed was more proportionate than the sentencing guidelines minimum range of 225 to 468 months due to defendant's offense variable score, which was "off the charts," as well as "the overall horrific nature of the crime, the predatory conduct, the premeditated nature of the matter, past violent criminal history, the lack of remorse, the lack of community support, fleeing of the scene, lack of rehabilitation, [and] hiding his identity all during the course of the crime." Additionally, the trial court specifically agreed with the prosecutor's arguments during sentencing, which included the prosecutor's statement that defendant was "a very dangerous individual and must be removed from the public forever." The trial court was not required to use magic language in sentencing defendant; rather, the record makes abundantly clear that the trial court was not only setting forth the reasons for the departure, but also justifying the extent of the departure.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel provided ineffective assistance because he failed to investigate and present an insanity defense. Whether a defendant has been denied the

effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). When reviewing claims of ineffective assistance of counsel this Court reviews the trial court's factual findings for clear error and its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Here, defendant preserved the claim of ineffective assistance of counsel by moving for a remand with this Court and requesting an evidentiary hearing; however, because this Court denied defendant's motion, review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval (On Remand)*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, 535 US at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant argues that defense counsel's failure to investigate and present an insanity defense deprived him of the right to the effective assistance of counsel. When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good faith effort to avail himself of the right to present that defense and that the defense was substantial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is one that might affect a trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant contends that defense counsel could have presented an insanity defense if defense counsel had inquired into defendant's medical history that revealed he was diagnosed with a mental illness. A person is legally insane if, "as a result of mental illness . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). "[M]ental illness . . . does not otherwise constitute a defense of legal insanity." *Id.* Defendant has failed to assert that he made a good faith effort to avail himself of the defense. The mere fact that defendant was diagnosed with a mental illness is not enough to establish an insanity defense. He has not argued that his alleged mental illness resulted in the lack of capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, as required by MCL 768.21a. He also failed to show that the defense was substantial.

Defendant contends that he submitted Michigan Department of Corrections (MDOC) records to show that he has a history of mental illness, i.e., bipolar disorder, and that his mental illness is significant enough to establish a defense of legal insanity. However, defendant provides no proof that he failed to appreciate the nature and quality of the wrongfulness of his conduct or that he lacked the capacity to conform his conduct to the law. Moreover, the trial record shows that defendant's conduct was purposeful. Defendant was angry with Heather, and he threatened to kill Heather's family. He obtained a gun, drove to Heather's family's house, knocked on the door, and shot Jordayna. He then fled the scene and disposed of the gun. Based

on these facts, defendant did not lack the capacity to conform his conduct to the law because he came up with a plan and then executed that plan. Without a basis for concluding that insanity was a substantial defense, defendant's claim of ineffective assistance of counsel premised on this ground must fail because defense counsel is not ineffective for failing to pursue a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

V. DOUBLE JEOPARDY

Defendant argues that his convictions and sentences violate his right to be free from double jeopardy. Defendant failed to preserve this issue, and thus, we review unpreserved claims of constitutional error for plain error affecting his substantial rights. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006).

The validity of multiple punishments under the double jeopardy provisions of the United States and Michigan Constitutions is generally determined under the "same-elements test," which requires this Court to determine "whether each provision requires proof of a fact which the other does not." *People v Smith*, 478 Mich 292, 305, 315-316; 733 NW2d 351 (2007). Defendant was convicted of six distinct crimes. That is, there are a total of eight counts, but only six applicable criminal statutes. The six crimes all have different elements. That is, every crime requires proof of a fact which the other crimes do not.

The elements for assault with intent to commit murder are: "(1) an assault, (2) with an actual intent to kill, and (3) which, if successful, would make the killing murder." *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992); MCL 750.83. The elements of felon in possession of a firearm are: (1) the defendant possessed a firearm, (2) the defendant had been convicted of a prior felony, and (3) less than five years had elapsed since the defendant had been discharged from parole or probation. *People v Perkins*, 262 Mich App 267, 270; 686 NW2d 237 (2004). The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). To convict a defendant of possession of marijuana, the prosecution must prove the following three elements: 1) the recovered substance is marijuana, 2) defendant was not authorized to possess the marijuana, and 3) defendant knowingly possessed the substance. MCL 333.7403(2)(d); see also *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). The elements of discharge of a weapon in a building are: (1) the defendant intentionally discharges a firearm, (2) in a facility, (3) the defendant knows or has reason to believe is an occupied structure, (4) in reckless disregard for the safety of any individual. *People v Henry*, 239 Mich App 140, 143; 607 NW2d 767 (1999). To convict a defendant of malicious use of service provided by a telecommunications service provider, the prosecution must prove that defendant "maliciously use[d] any service provided by a telecommunications service provider with intent to terrorize, frighten, or to disturb the peace and quiet of another person by . . . threatening physical harm or damage to any person . . . in the course of a conversation." MCL 750.540e. The six offenses have no point of commonality and all require proof of a fact that the other offenses do not. Because the crimes have different elements, defendant has failed to demonstrate an error affecting his substantial rights.

VI. DEFENDANT'S STANDARD 4 BRIEF

A. Ineffective Assistance of Counsel

Defendant has also filed a Standard 4 brief, see Michigan Supreme Court Administrative Order 2004-06, Standard 4, in which he raises several additional issues.

First, defendant contends that defense counsel was ineffective because he failed to investigate defendant's medical history and present the information as a mitigating factor at his sentencing. Defendant's assertion is simply not supported by the record. The presentence investigation report (PSIR) contains a recitation of defendant's mental health history. The PSIR indicates that defendant was diagnosed with bipolar disorder and clinical depression. It also notes the medications prescribed to treat defendant's mental health problems. At sentencing, the parties reviewed the PSIR. The trial court also indicated that it reviewed the PSIR that contained defendant's mental health history. Defendant's mental health history was provided to the trial court by means of the PSIR, and thus, defendant has failed to articulate an error by defense counsel or how that error would have a determinative effect on his sentencing. Defendant has also failed to articulate how defense counsel's failure to further investigate his medical history would have provided additional mitigating factors and how this failure fell below an objective standard of reasonableness. Accordingly, defendant has not shown that defense counsel was ineffective for failure to properly prepare for his sentencing.

Defendant argues that defense counsel was also ineffective for allowing the prosecution to elicit "Bad-Man Character Evidence." It appears that the "Bad-Man Character Evidence" defendant refers to was the evidence contained in a stipulation placed on the record revealing that defendant had a prior felony conviction. Defendant fails to show that defense counsel's acquiescence to the facts in the stipulation was unreasonable or prejudicial. The stipulation contained an element of the crime of felon in possession. The purpose of the stipulation is to minimize the prejudice to defendant. See *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998). The unembellished stipulation was arguably the best way to deflect attention from defendant's prior crime of second-degree murder. Further, there is no reasonable probability that defense counsel's refusal to accept the stipulation regarding the felon in possession of a firearm charge would have changed the outcome of his trial. Defendant has failed to demonstrate that defense counsel's acquiescence to the fact that he had a prior felony fell below an objective standard of reasonableness.

To the extent defendant contends that the information in the stipulation was precluded by MRE 404(b), we disagree. MRE 404(b) states that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." At trial, the parties agreed to the following:

[W]e have a stipulation to place on the record as it relates to the felony in possession of firearm count. That the People and the Defense would agree that the defendant had a prior felony conviction, and that he was ineligible to possess a firearm on September 9, 2009 because he was on parole at that time and hadn't regained eligibility.

The information provided was not used to imply anything relating to defendant's character. No implications or references were made by the prosecution regarding defendant's character or any

similarity of the prior conviction to the acts currently charged. We hold that defendant has failed to demonstrate that the information in the stipulation resulted in prejudice.

Next, defendant contends that defense counsel was ineffective because he misadvised defendant about his right to testify at trial. Defendant claims that defense counsel told him that if he testified the prosecutor would have introduced “Bad-Man Character Evidence.” Defendant asserts that this erroneous advice “deterred” him from exercising his right to testify and that his waiver of the right was not knowing or voluntary. The record does not support defendant’s assertion, but rather, the record reflects that it was defendant’s free and voluntary choice to testify.

At trial, defense counsel placed on the record that he informed defendant of his right to testify and defendant waived his right. The following colloquy ensued:

Defense Counsel: Your Honor, if I may, thank you for the time. My client is not going to testify. He understands he has a right to. And we have no witnesses to present.

The Court: All right.

The Prosecutor: Your Honor, if you just ask the defendant on the record if that’s true, that’s all we would require.

The Court: I don’t usually ask them if it’s not true they’re not going to testify. But Mr. Timmons, did you hear what your attorney just represented?

The Defendant: Yes, your Honor.

The Court: It’s my understanding you’re not going to be taking the stand in this matter.

The Defendant: Right.

The Court: And you have the right to do that if you choose to.

The Defendant: Right.

The Court: And you’re had an adequate opportunity to discuss that decision with your attorney?

The Defendant: Yes, ma’am

The Court: Do you have any questions of me or your attorney regarding your decision?

The Defendant: No.

Thus, when a defendant “decides not to testify or acquiesces in his attorney’s decision that he not testify, the right will be deemed waived.” *People v Simmons*, 140 Mich App 681, 685; 364

NW2d 783 (1985). Accordingly, defendant's argument is without merit and he failed to overcome the presumption that defense counsel's advice not to testify was a reasonable trial strategy.

Defendant also argues that defense counsel's failure to request an adjournment violated his right to the effective assistance of counsel because defense counsel did not have an adequate opportunity to prepare for trial. Defendant frames this issue in his statement of questions presented; however, defendant does not explain his position or provide any analysis or discussion to support his argument. Defendant's failure to offer any meaningful discussion of this claim of error renders his claim abandoned. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). In any event, having thoroughly reviewed the transcripts, we conclude that defense counsel was clearly prepared for trial and offered defendant effective assistance. Defendant failed to establish that his defense counsel was ineffective.

B. Prosecutorial Misconduct

Defendant argues that the prosecutor engaged in misconduct. We deem defendant's claim abandoned because defendant failed to provide any meaningful analysis or citation to the record. *People v Kelly*, 231 Mich App 627, 640–641; 588 NW2d 480 (1998).

C. Trial Court's Failure To Comply With MCR 8.111(C)

Defendant argues that the judge that presided at trial was not properly assigned by the chief judge, as set forth in MCR 8.111(C). Defendant failed to preserve this issue, and thus, we review this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In general, only a properly assigned judge can enter dispositive orders in a case. *Schell v Baker Furniture Co*, 461 Mich 502, 515, n13; 607 NW2d 358 (2000). Further, a chief judge is required to enter a written order when reassigning a circuit judge, stating the reason for the reassignment. MCR 8.111(C). We conclude that defendant has not established a plain error. On February 19, 2010, Judge Goldsmith entered an order transferring the case to Judge Grant for a jury trial. On February 26, 2010, Chief Judge Grant reassigned the case by written order. The order stated, "The Judge to whom this case was assigned, the Honorable Judge Mark A. Goldsmith, is unable to hear this case because-efficient administration of justice." The order was signed by Chief Judge Grant and she reassigned the case to herself.¹ The record clearly reflects that the judge that presided over defendant's trial was properly assigned, as set forth in MCR 8.111(C).

In defendant's discussion section, he also argues that he was entitled to a ruling by Judge Grant regarding the prosecution's MRE 404(b) motion. The trial record shows that the prior judge, Judge Goldsmith, entered an order granting the prosecution's motion to admit defendant's

¹ In this case, it so happens that the Chief Judge and the successor judge assigned to the case are the same, Judge Nanci Grant.

prior murder conviction in its case in chief. At the time, Judge Goldsmith had the authority to enter the order, and thus, this order resolved the prosecution's motion. See *Schell*, 461 Mich at 515. However, under the court rules, a judge may reconsider and modify any order. See MCR 6.435.

MCR 6.435 provides, in pertinent part:

After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

Under this rule, Judge Grant could have reconsidered the order entered by Judge Goldsmith; however, the rule does not require that the judge reconsider an order. Although Judge Grant voiced concern over Judge Goldsmith's order, she was neither required to reconsider the order nor did she modify or rescind the order granting the prosecution's MRE 404(b) motion. See MCR 6.435. Furthermore, if defendant had an objection to the order by Judge Goldsmith, his redress was to file a motion for reconsideration or appeal the decision. MCR 2.119(F). Defendant did neither. Finally, the evidence that defendant complains of was never referenced at trial. Though the prosecutor appeared to have the right to introduce evidence of defendant's prior murder conviction, it never did so. Accordingly, defendant has failed to show any error affecting his substantial rights.

D. Ginther Hearing

Finally, defendant argues that he is entitled to a remand for an evidentiary hearing. A motion to remand must identify an issue sought to be reviewed on appeal and show either (1) that the issue is one of record that must be decided by the trial court before this Court may review the issue, or (2) that development of a factual record is required for appellate consideration of the issue. MCR 7.211(C)(1)(a). The motion must be supported by an affidavit or offer of proof regarding the facts to be established at the hearing on remand. MCR 7.211(C)(1)(a). Whether to grant a motion to remand is discretionary with this Court. *People v Hernandez*, 443 Mich 1, 15; 503 NW2d 629 (1993), abrogated on other grounds 454 Mich 145 (1997). We conclude that the issues are not ones of record that must be decided by the trial court before this Court may review the issues. That is, defendant's claims simply present no need for a remand as this Court can review the existing record. Further, defendant does not explain what relevant facts require development at an evidentiary hearing to support his claims. On examination of defendant's allegations of ineffective assistance of counsel and prosecutorial misconduct, we conclude that there is no basis or need for an evidentiary hearing for further development of a factual record. As discussed above, defense counsel was not ineffective and the prosecutor did not engage in misconduct.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly